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IN THE

Supreme Court of the United States

October Term, 1957.

No. 624.

ALBERT TOWERS,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ALBERT AVERBACH,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Reply Brief for Petitioners in Support of Writ of Certiorari.

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REASONS IN REPLY FOR GRANTING WRIT OF CERTIORARI.

Replying to respondent's argument advanced in Point 1 of its brief and in addition to those cases set forth in the petition herein, the Court's attention is respectfully called to the case of *United States v. Nugent*, C. C. A., 6th Cir., 100 Fed. 2d 215. Here judgment awarding damages under the Tucker Act, Title 28, Sec. 41(20) U. S. C., was on appeal. Evidence had been heard by one District Judge without his making Findings of Fact or Conclusions of Law. Another Judge, under a general designation, made the Findings and Conclusions based upon a stenographer's report of the testimony and entered judgment without hearing the witnesses.

In reversing the judgment, the Circuit Court stated at page 217:

> "The question whether such a case can properly be tried by two different judges, one hearing the testimony and the other making ultimate findings and conclusions, *is of extreme importance*, as the findings of the trial court are conclusive and have the effect of a jury verdict unless manifest error exists. Cf. *United States v. Berdan Firearms Mfg. Co.*, 156 U. S. 552, 15 S. Ct. 420, 39 L. Ed. 530; *Bassett v. United States*, 9 Wall. 38, 19 L. Ed. 548; *Stanley v. Board of Supervisors of Albany*, 121 U. S. 535, 547, 7 S. Ct. 1234, 30 L. Ed. 1000; *Lehnen v. Dickson*, 148 U. S. 71, 73, 13 S. Ct. 481, 37 L. Ed. 373; *State Farm Mutual Automobile Ins. Co. v. Coughran*, 303 U. S. 485, 487, 58 S. Ct. 670, 82 L. Ed. 970. This rule is based largely upon the superior opportunity which the trier of the facts has to ascertain the truth, due to personal observation of the witnesses. *Westchester Fire Ins. Co. v. Bringle*, 6 Cir. 86 F. 2d 262, 264; *In re Great Lakes Transit Corp. Ltd.*, 6 Cir. 81 F. 2d 441, 443; *The William A. Paine*, 6 Cir. 39 F. 2d 586, 588; *Brush-Moore Newspapers, Inc., v. Commissioner*, 6 Cir. 95 F. 2d 900, 902. The trial judge has the right and duty to observe the bearing and demeanor of the witnesses, and where the evidence is conflicting, he may take these things into account. Such personal observations cannot be transferred to the printed page, and yet the judge may, and often must, give them weight in making his decision. *In the present instance it is difficult to see how the judge who entered the findings had any proper opportunity to decide any questions affected by the credibility of the witnesses.* While the statute does not in terms require that the same judge shall hear the evidence and make the findings, since by universal practice and tradition these findings are based upon personal observation of the witnesses, and are conclusive upon the reviewing court, *the statute impliedly requires that the*

same judge who hears the case shall make the findings and conclusions, and this requirement is mandatory.

"We bear in mind the fact that the court is a continuing entity, however, often the incumbent may change. In the Judicial Code the judge is frequently referred to as the court, and in Sec. 764, Title 28, U. S. C., 28 U. S. C. A. Sec. 764, the word 'court' is evidently applied to the judge who presides over the trial, and not to the court as an institution." (Italics ours.)

We respectfully submit that this forceful decision of the Circuit Court of Appeals speaks with an authority which finds its foundation in the Fifth Amendment to the Constitution. No enlargement of ours upon this decision could improve its forcefulness. It fittingly applies to our cases because in them is found the lack of due process which is so present in the *Nugent* case, *supra*, and which constituted reversible error.

Again, petitioners point to the harm done to them by the decision of a Judge other than the hearing Judge and submit that proof of the harm is reflected in the argument of the respondent in its brief at pages 7 and 8. There it argues that the loans made by the petitioners were not deductible as business bad debts, and writes "these loans appear to have been merely accommodation advances made from necessity because of petitioners' practical interest in the company. In short, petitioners were not engaged in any business to which the losses were proximately related." Evidence to establish the propriety of the deductions of the loans as business bad debts was taken before Judge Black, the hearing Judge. The intent of the parties to the loans was expressed by the witnesses. Other evidence from the books and records was introduced. Who can now say that Judge Black did not believe the witnesses and the evidence? Who can now say that he was not satisfied with their intent and motive, honesty and integrity? Who can now

say that after observing their demeanor and conduct as witnesses, and hearing their spoken words, he was not satisfied that such loans were proximately related to their business?

Respondent does not directly deny such a state of facts, rather, it can now argue that these loans "*appear*" to have been accommodations. Perhaps they did not so "*appear*" to Judge Black, although seemingly so appearing to Judge Fisher. Thus, the constitutional guaranty that the hearing Judge should decide is well pointed up here. There would be no need of conjecture or guesswork on this important issue if the hearing Judge had decided the matter. There would have been no deprivation of petitioners' rights had the Judge, who heard the cases, decided them upon the evidence produced, bulwarked with his opportunity to weigh the testimony of the witnesses in the light of their demeanor, their actions and their general appearance on the witness stand. Their credibility as to intention, motive and design was at stake and surely no better guide to the hearing Judge was his ability to weigh the evidence in conjunction with the personal appearance of the witnesses and their spoken words. Judge Fisher was denied and deprived of this privilege and such lack of first-hand knowledge and opportunity to weigh evidence as it came from the lips of the witnesses prevented him from making a decision which was in accordance with due process under these circumstances.

The petitioners have steadfastly contended that such loans were bona fide and were proximately related to their business. Now, at this stage of the case, we find the respondent still contending that such loans "appear" to have been merely accommodation advances. "Appear" to whom, we respectfully ask? It matters not a whit what they "appear" to be *now* to respondent, because the crux of the case is how did they "appear" to Judge

Black? How much was he influenced at the trial by the credibility of the petitioners? How much was he influenced by their demeanor and actions and their honesty and integrity? Can respondent say? Can Judge Fisher say? Obviously not, and because of this lack of a most important phase of the trial procedure, we respectfully say that Judge Fisher was wholly unable to substitute his opinion based upon the printed word rather than upon the actual presence of the witnesses on the stand.

In our main brief, we have set forth several cases where, in several Circuits, such losses were held to be proximately related to the taxpayers' business. We say that, guided by these decisions, in which the test to be applied in determining the proximate relationship of the loans to the business is well set out, petitioners more than bring themselves within the test and rule. What is more, we say that there is not a uniformity in decision in the several Circuits in this respect and unfairness and inseveral circuits in this respect and unfairness and inequality have been the result. Certainly, it is of general importance that the Internal Revenue Act should be interpreted fairly and equally in every section of the United States. It is not so interpreted as palpably appears from these several decisions. Such unfairness and inequality of application of law plus the diversity of decision in the several Circuits make it very important to all taxpayers and to the respondent alike, that there be a uniformity of law in this respect. We believe that the facts of petitioners' cases here permit the making of the "law of the land." Isolated incidents of loans or advances are not contained herein; rather, continuity of business venture and a lifetime of promotional work are apparent and *stipulated*. Under such circumstances, a decision based upon such facts would properly be considered "the law of the land" and not a decision based upon isolated instances.

It is respectfully submitted that petitioners' application warrants further review by the Supreme Court to the end that once and for all, the question of the constitutional right of petitioners to a decision by the hearing Judge under these facts be determined and that the very important question of deductibility of losses such as were incurred by petitioners herein be decided by this Court as the law of the land.

Replying to the argument advanced by the respondent (Point 4) at pages 10 to 12 inclusive of its brief, petitioners restate their position that the amounts received from Rumsey Manufacturing in 1945 were repayment of a loan and not taxable as income. The Commissioner treated these payments as dividends. The Tax Court went beyond the scope of its authority under the issues and not only held the amounts to be repayments of loans, but further held the amounts taxable as income to petitioners and decided that the record contained no proof of a basis. The Court of Appeals has affirmed this. Consequently, petitioners here argue that such action was erroneous and such has been their position at all times.

While the cases cited by the respondent in its brief do indicate that under the facts of those cases the Commissioner has a choice in asserting a tax against the assignees, the facts of those two cases are completely different than the facts at hand. For this reason, petitioners have fully set forth in their petition those cases where the Courts have passed upon points involved under similar state of facts and such decisions are far more applicable herein.

As to proof of basis, petitioners have pointed out below that there was testimony indicating a basis of $5,000 for Hayman, and a basis of $33,000 for Balch, App. p. 67a below. Because of this, petitioners respectfully contend that the decision of the Circuit Court below is in direct conflict with other decisions of that Court and with decisions in like matters in the Supreme Court.

Errata in Petitioners' Main Brief.

1. Index of Rules and Statutes, now reads:

26 U. S. C., Sec. 116 9

This should read:

26 U. S. C., Sec. *1116* 9

2. Page 14 of brief at top of page now reads:

conflict in the oral testimony, the member of the court who observed opportunity to appraise, etc.

This should read:

conflict in the oral testimony, the member of the court *who observed the witnesses while testifying and thus had an* opportunity to appraise, etc.

It is respectfully submitted that the decision of the non-hearing Judge constitutes a deprivation of procedural due process. The conflict of decision on the same subject matter plus the conflict of decision on the same matter with decisions of the Supreme Court entitle petitioners to redress herein. The writ of certiorari should be granted for these reasons.

Respectfully submitted,

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